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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 DANIEL KULBERG,

12 Plaintiff,

13 v.

14
15 WASHINGTON MUTUAL BANK,
16 et al.,

17 Defendants.
18

CASE NO: 10-CV-1214 W (BLM)

ORDER:

(1) GRANTING DEFENDANT'S
MOTION TO DISMISS [DOC.
20], AND

(2) GRANTING DEFENDANT'S
MOTION TO STRIKE [DOC. 19]

19 On June 7, 2010, Plaintiff Daniel Kullberg¹ filed this lawsuit against the
20 defendants. On September 20, 2010, Defendant J.P. Morgan Chase filed a motion to
21 dismiss, a motion for a more definite statement, and a motion to strike portions of the
22 complaint. Plaintiff opposes the motions.

23 The Court decides the matter on the papers submitted and without oral
24 argument. See Civ. L.R. 7.1(d)(1). For the following reasons, the Court **GRANTS**
25 Defendant's motion to dismiss (Doc. 20), and **GRANTS** Defendant's motion to strike
26 (Doc. 19).
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¹ Plaintiff's name is misspelled in the complaint. His last name is spelled Kullberg.

1 **I. BACKGROUND**

2 On May 23, 2003, Plaintiff obtained a \$1,070,000.00 mortgage loan from
3 Defendant to refinance the mortgage of real property in Coronado, California
4 (“Property”). (*Compl.* ¶ 13 [Doc. 1].) He also secured a second mortgage loan that
5 same day in the amount of \$200,000.00 from the Dorothy Laing Living Trust. (*Id.* ¶
6 15.) On or about February 14, 2006, Plaintiff secured a third loan with First Regional
7 Bank for \$250,000.00. (*Id.* ¶ 16.)

8 In late 2008, Plaintiff began having difficulty making payments on his mortgage.
9 (*See Compl., Ex. 7*, at 1–2.) On April 6, 2009, Plaintiff was served with a “Notice of
10 Default and Election to Sell Under Deed of Trust” reflecting a default for December
11 2008 and subsequent payments. (*Id.*)

12 On April 22, 2010, Plaintiff filed a civil action in the San Diego County Superior
13 Court asserting eleven causes of action against the defendants, including: (1) breach of
14 contract; (2) declaratory relief; (3) fraud based on deceit and misrepresentation; (4)
15 breach of the covenant of good faith and fair dealing; (5) reformation of unconscionable
16 contract; (6) unfair and unlawful business practice; (7) quiet title; (8) rescission based
17 on fraud; (9) accounting; (10) violation of California Civil Code § 2923.5; and (11)
18 violation of the Truth in Lending Act (“TILA”).

19 On June 7, 2010, Defendants removed the case to this Court. On September 20,
20 2010, Defendants moved to dismiss and strike. Plaintiff opposes both motions.

21
22 **II. MOTION TO DISMISS - RULE 12(B)(6)**

23 **A. Legal Standard**

24 The court must dismiss a cause of action for failure to state a claim upon which
25 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
26 tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n.*, 720 F.2d
27 578, 581 (9th Cir. 1983). All material allegations in the complaint, “even if doubtful
28 in fact,” are assumed to be true. *Id.* The court must assume the truth of all

1 factual allegations and must “construe them in light most favorable to the nonmoving
2 party.” Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v.
3 Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

4 As the Supreme Court has explained, “[w]hile a complaint attacked by a Rule
5 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s
6 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels
7 and conclusions, and a formulaic recitation of the elements of a cause of action will not
8 do.” Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the allegations
9 in the complaint “must be enough to raise a right to relief above the speculative level.”
10 Id. at 1964-65. A complaint may be dismissed as a matter of law either for lack of a
11 cognizable legal theory or for insufficient facts under a cognizable theory. Robertson v.
12 Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

13 Generally, courts may not consider material outside the complaint when ruling
14 on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
15 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically
16 identified in the complaint whose authenticity is not questioned by parties. Fecht v.
17 Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other
18 grounds). Moreover, courts may consider the full text of those documents, even when
19 the complaint quotes only selected portions. Id. The court may also consider material
20 properly subject to judicial notice without converting the motion into one for summary
21 judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

22 23 **B. Plaintiff’s TILA Claims Are Time Barred.**

24 TILA damage claims are subject to a one-year statute of limitations. 15 U.S.C.
25 § 1640(e). TILA rescission claims are subject to a three-year statute of limitations. 15
26 U.S.C. § 1635(f). Under TILA, the statute of limitations begins to run at the time the
27 loan documents were signed. Meyer v. Ameriquest Mortg. Co., 342 F.3d 899, 902 (9th
28

1 Cir. 2003) (“The failure to make the required disclosures occurred . . . at the time the
2 loan documents were signed.”).

3 However, the doctrine of equitable tolling may “suspend the limitations period
4 until the borrower discovers or had reasonable opportunity to discover the fraud or
5 nondisclosures that form the basis of the TILA action.” King v. State of Cal., 784 F.2d
6 910, 915 (9th Cir. 1986). Equitable tolling “applies in situations . . . ‘where the
7 complainant has been induced or tricked by his adversary’s misconduct into allowing the
8 filing deadline to pass.’” Velazquez v. GMAC Mortg. Corp., 605 F. Supp.2d 1049, 1061
9 (C.D. Cal. 2008) (quoting O’Donnell v. Vencor, Inc., 465 F.3d 1063, 1068 (9th Cir.
10 2008)).

11 Here, Plaintiff indicates in the complaint that the loan was consummated in May
12 2003. (*Compl.* ¶ 13.) However, this lawsuit was first filed in April 2010, more than
13 seven years later. (*Id.* at ¶ 74.) Therefore, unless Plaintiff is entitled to equitable tolling,
14 his TILA claims are time barred.

15 In his opposition, Plaintiff contends that equitable tolling should apply to his
16 TILA damage claim, but fails to explain why. (*Pl.’s Opp’n* 12:8–10 [Doc. 21].) In fact,
17 Plaintiff implicitly concedes that his allegations in the complaint are insufficient to
18 support his equitable-tolling argument. (*Id.* (“[I]f given leave to amend, Plaintiff will
19 allege facts showing why his damage claims are not time barred by virtue of equitable
20 tolling.”).) Therefore, there are no facts alleged to justify applying the doctrine of
21 equitable tolling.

22 Accordingly, the Court **DISMISSES** Plaintiff’s TILA claims **WITHOUT**
23 **PREJUDICE**.

24
25 **C. Plaintiff Fails to Allege Facts That Demonstrate Breach of Contract.**

26 To allege an action for breach of contract, a plaintiff must plead: (1) the existence
27 of a contract; (2) plaintiff’s performance of the contract or excuse for non-performance;
28 (3) defendant’s breach of the contract; and (4) resulting damages to plaintiff. First

1 Commercial Mortg. Co. v. Reece, 89 Cal. App. 4th 731, 745 (2001). “[W]hen a written
2 instrument is attached to the pleading and properly incorporated therein by reference,
3 the court may examine the exhibit and treat the pleader’s allegations of its legal effect
4 as surplusage.” Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1064 (2004).

5 Here, the contract identified is the Deed of Trust. (*Compl.* ¶ 18.) Plaintiff’s cause
6 of action is based on the contention that he was not given 30-days notice prior to
7 acceleration as required by the “Acceleration; Remedies” provision. (*Compl.*, *Ex.* 3 ¶
8 22.) Even though Plaintiff fails to allege acceleration in the complaint, the Notice of
9 Default demonstrates that Defendant did in fact accelerate the loan, and thus, was
10 required to give notice. (*Compl.*, *Ex.* 7, at 2 (“[Defendant] . . . has elected and does
11 hereby elect to cause the trust property to be sold to satisfy the obligations secured
12 thereby.”).)

13 Under California Civil Code § 2923.5, a lender may not file the notice of default
14 until 30 days after an initial contact is made with the borrower or 30 days after satisfying
15 § 2923.5(g)’s due-diligence requirement. Wienke v. Indymac Bank FSB, No. CV 10-
16 4082 NJV, 2011 WL 871749, at *5 (N.D. Cal. Mar. 14, 2011). Plaintiff alleges that he
17 was not given actual notice. However, the Notice of Default states that Defendant
18 declared that it “contacted the borrower, tried with due diligence to contact the
19 borrower as required by California Civil Code [§] 2923.5, or the borrower has
20 surrendered the property.” (*Id.*) Plaintiff neither disputes nor alleges facts that show
21 that Defendant did not try to with due diligence to contact him. Therefore, based on
22 an examination of the Deed of Trust and the Notice of Default, incorporated here by
23 reference, Plaintiff has not sufficiently alleged facts to demonstrate that Defendant
24 breached the contract.

25 Accordingly, the Court **DISMISSES** the first cause of action for breach of
26 contract **WITHOUT PREJUDICE**.

1 **D. Plaintiff Fails to Allege Any Cause of Action That Supports**
 2 **Declaratory Relief.**

3 Under 28 U.S.C. § 2201, “any court of the United States, upon the filing of an
 4 appropriate pleading, may declare the rights and other legal relations of any interested
 5 party seeking such declaration, whether or not further relief is or could be sought.”
 6 “Declaratory relief, however, may be unnecessary where an adequate remedy exists
 7 under some other cause of action. Sorrels v. J.P. Morgan Chase Nat’l Corporate Servs.,
 8 Inc., No. 09cv2884 L(WMc), 2011 WL 662980, at *6 (S.D. Cal. Feb. 14, 2011) (Lorenz,
 9 J.). “A claim for declaratory relief ‘rises or falls with [the] other claims.’” Id.

10 Plaintiff’s request for declaratory relief is redundant given that he recites the same
 11 allegations set forth in the other ten causes of action, and it does not appear to be useful
 12 in clarifying the rights and other legal relations between the parties. Therefore, Plaintiff
 13 fails to allege any valid causes of action that supports declaratory relief.

14 Accordingly, the Court **DISMISSES** the second cause of action for declaratory
 15 relief **WITHOUT PREJUDICE**.

16
 17 **E. Plaintiff’s Fraud Allegation Fails to Meet the Heightened Pleading**
 18 **Standard of Rule 9(b).**

19 Under California law, the elements of common-law fraud are: (1)
 20 misrepresentation; (2) knowledge of the falsity; (3) intent to defraud; (4) justifiable
 21 reliance; and (5) damages. Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). “[T]o
 22 establish a cause of action for fraud[,] a plaintiff must plead and prove in full, factually
 23 and specifically, all of the elements of the cause of action.” Conrad v. Bank of Am., 45
 24 Cal. App. 4th 133, 156 (1996). Furthermore, there must be a showing that the
 25 defendant “intended to induce the plaintiff to act to his or her detriment in reliance
 26 upon the false representation.” Id. at 157.

27 When a claim is “grounded in fraud and its allegations fail to satisfy the
 28 heightened pleading requirements of Rule 9(b), a district court may dismiss the . . .

1 claim.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). Thus, the
2 plaintiff “must state with particularity the circumstances constituting fraud.” Fed. R.
3 Civ. P. 9(b). That is, allegations of fraud must be accompanied by “the who, what,
4 when, where, and how” of the misconduct charged. Vess, 317 F.3d at 1106 (internal
5 quotation marks omitted).

6 Rule 9(b) also “does not allow a complaint to merely lump multiple defendants
7 together but require[s] plaintiffs to differentiate their allegations when suing more than
8 one defendant . . . and inform each defendant separately of the allegations surrounding
9 his participation in the fraud.” Swartz v. KPMG LLP, 476 F.3d 756, 765-66 (9th Cir.
10 2007). When asserting fraud against a corporation, “the plaintiff’s burden . . . is even
11 greater The plaintiff must ‘allege the names of the persons who made the allegedly
12 fraudulent representations, their authority to speak, to whom they spoke, what they said
13 or wrote, and when it was said or written.” Lazar, 12 Cal. 4th at 645.

14 Here, Plaintiff alleges that Defendant failed to disclose that the loan was an
15 adjustable-rate loan and that he did not qualify for the loan. (*Compl.* ¶¶ 33–35.)
16 However, Plaintiff’s complaint falls far short of providing the allegations necessary to
17 state a cause of action for fraud. Foremost, Plaintiff fails to identify any type of
18 communication with Defendant or any misrepresentation made by Defendant coupled
19 with actual knowledge of falsity. Additionally, Plaintiff fails to inform each specific
20 defendant of the allegation surrounding its alleged participation in the fraud. In this
21 case, he alleges fraud against two corporations. However, contrary to the Rule 9(b)
22 requirements, Plaintiff fails to allege the names of the individuals who made the
23 allegedly fraudulent representations as well as when and where these representations
24 were made. Therefore, Plaintiff’s fraud allegation fails to meet the heightened pleading
25 standard of Rule 9(b).²

26 Accordingly, the Court **DISMISSES** the third cause of action for fraud based on
27 deceit **WITHOUT PREJUDICE**.

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² Defendant also argued that this cause of action is time barred, but failed to elaborate.

1 **F. Plaintiff's Allegations Fail to Invoke the Implied Covenant of Good**
 2 **Faith and Fair Dealing.**

3 “To establish a breach of an implied covenant of good faith and fair dealing, a
 4 plaintiff must establish the existence of a contractual obligation, along with conduct that
 5 frustrates the other party’s rights to benefit from the contract.” Fortaleza v. PNC Fin.
 6 Servs. Group, Inc., 642 F. Supp. 2d 1012, 1021-22 (N.D. Cal. 2009). Further, “a breach
 7 of the implied covenant of good faith and fair dealing involves something beyond breach
 8 of the contractual duty itself.” Careau & Co. v. Security Pac. Bus. Credit, Inc., 222 Cal.
 9 App. 3d 1371, 1394 (1990). “[The] implied covenant of good faith and fair dealing is
 10 limited to assuring compliance with the express terms of the contract, and cannot be
 11 extended to create obligations not contemplated by the contract.” Pasadena Live, LLC
 12 v. City of Pasadena, 114 Cal. App. 4th 1089, 1093-94 (2004).

13 Plaintiff fails to allege or identify a contract or contract provision to invoke an
 14 implied covenant to impose on Defendant liability for the alleged wrongs. Furthermore,
 15 as discussed above, he also fails to sufficiently plead breach to invoke the implied
 16 covenant of good faith and fair dealing. Plaintiff cannot simply manufacture obligations
 17 for Defendant that do not exist.

18 Accordingly, the Court **DISMISSES** the fourth cause of action for breach of the
 19 covenant of good faith and fair dealing **WITHOUT PREJUDICE**.

20
 21 **G. Plaintiff Fails to Sufficiently Plead the Elements for Reformation of**
 22 **Unconscionable Contract.**

23 To state a claim for reformation under California law, a plaintiff must plead that
 24 “by reason of fraud practiced by one of the parties, or of the mutual mistake of the
 25 parties or of a mistake of one of them, which the other at the time knew or suspected,
 26 there were omitted from the instrument certain material terms and conditions.” Pascoe
 27 v. Morrison, 219 Cal. 54, 56 (1933). “[I]n other words, that the language of the writing,
 28 for some reason, failed to express the intention of the parties.” Id. “Basic to a cause of

1 action for reformation is a showing of a definite intention or agreement on which the
 2 minds of the parties had met which pre-existed and conflicted with the instrument in
 3 question.” Appalachian Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1, 21
 4 (1989) (citation and internal quotation marks omitted).

5 Here, Plaintiff fails to allege the terms of an agreement between the parties and
 6 how the contract failed to express that agreement. Moreover, to the extent Plaintiff
 7 attempts to establish unconscionability, Plaintiff fails to sufficiently allege facts that
 8 support that the terms of the contract are unconscionable. See Marin Storage &
 9 Trucking, Inc. v. Benco Contracting & Eng’g, Inc., 89 Cal. App. 4th 1042, 1053-56
 10 (2001) (discussing that two tests for unconscionability—one balancing oppression,
 11 surprise, and unreasonableness of the terms; and the other analyzing whether the
 12 contract terms are unduly oppressive).³

13 Accordingly, the Court **DISMISSES** the fifth cause of action for reformation of
 14 unconscionable contract **WITHOUT PREJUDICE**.

15
 16 **G. Plaintiff Lacks a Sufficient Basis for an Unfair and Unlawful Business**
 17 **Practice Action.**

18 Section 17200 of the California Business and Professions Code prohibits acts of
 19 unfair competition that include “any unlawful, unfair or fraudulent business act or
 20 practice.” Furthermore, it “borrows violations of other laws and treats them as unlawful
 21 practices.” Saunders v. Superior Court, 27 Cal. App. 4th 832, 839 (1994). As such, a
 22 defendant cannot be liable for “committing unlawful business practices without having
 23 violated another law.” Ingles v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th
 24 1050, 1060 (2005).

25
 26 ³ The Court also notes that to the extent that the reformation cause of action is based
 27 on the May 2003 loan transaction, it may be barred by the three-year statute of limitations
 28 applicable to an action for reformation. See Cal. Code Civ. Proc. § 338(d); Getty v. Getty, 187
 Cal. App. 3d 1159, 1168 (1986).

1 Here, Plaintiff's unfair-competition cause of action is based on various factual and
2 legal allegations asserted in the complaint. (*See Compl.* ¶ 47.) However, as discussed
3 above and below, the Court has found that all of Plaintiff's other causes of action
4 contain defects subjecting them to dismissal. Therefore, without a violation of a federal
5 or state law to serve as a basis for this cause of action, Plaintiff's unfair-competition
6 action is insufficiently pled.

7 Accordingly, the Court **DISMISSES** the sixth cause of action for unfair and
8 unlawful business practice **WITHOUT PREJUDICE**.

9
10 **H. Plaintiff Fails to Allege Facts to Support an Action for Quiet Title.**

11 Under California law, a plaintiff cannot assert quiet title in his property against
12 his mortgage lender "without discharging his mortgage debt." *Aguilar v. Bocci*, 39 Cal.
13 App. 3d 475, 477 (1974). "The cloud upon his title persists until the debt is paid." *Id.*
14 "He is entitled to remain in possession but cannot clear his title without satisfying his
15 debt." *Id.* at 477-78.

16 Plaintiff fails to allege that he has paid the outstanding debt on the Property or
17 that he can do so. Therefore, this cause of action is also insufficiently pled.
18 Accordingly, the Court **DISMISSES** the seventh cause of action for quiet title
19 **WITHOUT PREJUDICE**.

20
21 **I. Plaintiff Fails to Sufficiently Allege the Elements for Rescission Based**
22 **on Fraud.**

23 Under California law, to establish rescission under a theory of fraud: (1) the
24 defendant must have concealed or suppressed a material fact; (2) the defendant must
25 have been under a duty to disclose the fact to the plaintiff; (3) the defendant must have
26 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff;
27 (4) the plaintiff must have been unaware of the fact and would not have acted as he did
28 if he had known of the concealed or suppressed fact; and (5) as a result of the

1 concealment or suppression of the fact, the plaintiff must have sustained damage. Mktg.
 2 W., Inc. v. Sanyo, 6 Cal. App. 4th 603, 612-13 (1992).

3 Plaintiff fails to allege that Defendant was under a duty to disclose that Plaintiff
 4 was placed “into a loan that she [sic] would not be able to continue making monthly
 5 mortgage payments for the duration of the loan period” (*Compl.* ¶ 14), and that he was
 6 unaware of the insufficiency of his income to cover the cost of the loan. Furthermore,
 7 as discussed above, Plaintiff has not pled with sufficient particularity the elements
 8 constituting fraud under Rule 9(b). *See Swartz*, 476 F.3d at 764.

9 Accordingly, the Court **DISMISSES** the eighth cause of action for rescission
 10 based on fraud **WITHOUT PREJUDICE**.⁴

11 12 **J. Plaintiff Fails to Allege the Elements for Accounting.**

13 “A cause of action for an accounting requires a showing that a relationship
 14 between the plaintiff and defendant that requires an accounting, and that some balance
 15 is due the plaintiff that can only be ascertained by an accounting.” Leisher v. Wachovia
 16 Mortg., Inc., No. 10cv2294-WQH-POR, 2011 WL 98575, at *10 (S.D. Cal. Jan. 12,
 17 2011) (Hayes, J.) (quoting Tesell v. McLoughlin, 173 Cal. App. 4th 156, 179 (2009)).

18 Plaintiff fails to allege that “some balance is due [to] the plaintiff.” *See Liesher*,
 19 2011 WL 98575, at *5. Rather, he alleges that “[t]he amount of money Defendants owe
 20 to Plaintiff are unknown.” (*Compl.* ¶ 64.) Plaintiff does not cite any authority
 21 permitting an action for accounting under California law when the plaintiff does not
 22

23 ⁴ When a plaintiff seeks rescission based on fraud, the four-year statute of limitations
 24 “does not begin to run until discovery by the aggrieved party of the facts constituting fraud or
 25 mistake.” Cal. Civ. Proc. Code § 337(3). “Plaintiff must be able to truthfully and specifically
 26 allege that he discovered the facts constituting fraud or mistake after the loan transaction.”
 27 Gusakov v. Wash. Mut. Bank, FA, No. C 09-04747 SI, 2010 WL 2612349, at *8 (N.D. Cal.
 28 June 24, 2010). However, Plaintiff fails to specifically allege when he discovered the facts
 constituting the alleged fraud after the loan transaction. Thus, the Court also notes that this
 action may also be time barred.

1 claim that the defendant owes him money. See id. at *11 (citing Union Bank v.
 2 Superior Court, 31 Cal. App. 4th 573, 593-94 (1995) (dismissing the accounting claims
 3 since the defendant owed no money to plaintiffs and did not deprive them of any
 4 monies)); see also Hernandez v. First Am. Loanstar Tr. Servs., No. 10cv119
 5 BTM(WVG), 2010 WL 1445192, at *5 (S.D. Cal. Apr. 12, 2010) (“Plaintiffs, as the
 6 party owing money, not the party owed money, have no right to seek an accounting.”);
 7 Mendoza v. Countrywide Home Loans, Inc., No. C-09-3648 SC, 2009 WL 4706350, at
 8 *8 (N.D. Cal. Dec. 3, 2009) (same).

9 Accordingly, the Court **DISMISSES** the ninth cause of action for accounting
 10 **WITHOUT PREJUDICE**.

11
 12 **K. Plaintiff’s Civil Code § 2923.5 Claim Has Not Been Properly Pled.**

13 Section 2923.5 requires that a lender “contact the borrower in person or by
 14 telephone in order to assess the borrower’s financial situation and explore options for
 15 the borrower to avoid foreclosure” before filing a notice of default. Cal. Civil Code §
 16 2923.5(a)(2). The lender may not file a notice of default until 30 days after initial
 17 contact is made or 30 days after satisfying the § 2923.5(g)’s due-diligence requirements.
 18 Id. § 2923.5(a)(1). A lender satisfies the due-diligence requirements if it was not able
 19 to contact the borrower after: (1) sending a letter with certain information; (2) then
 20 calling the borrower “by telephone at least three times at different hours and on
 21 different days”; (3) if the borrower does not respond within two weeks after the
 22 telephone calls, sending a certified letter with return receipt requested; (4) providing a
 23 toll-free telephone number that will provide access to a live representative during
 24 business hours; and (5) posting a prominent link on the lender’s homepage with certain
 25 information. Id. § 2923.5(g); Wienke, 2011 WL 871749, at *5.

26 Here, the complaint does not sufficiently state a cause of action for violation of
 27 § 2923.5 because it is either silent or wrong on a several material points. For example,
 28 Plaintiff alleges in the complaint that Defendant failed to make contact. However, he

1 fails to make any factual allegations as to whether Defendant complied with §
2 2923.5(g)'s due-diligence requirements. Also, Plaintiff alleges that Defendant failed to
3 make a proper declaration in accordance with § 2923.5. But this is unequivocally false.
4 The Notice of Default—submitted by Plaintiff as an exhibit to his complaint—included
5 the necessary language practically verbatim from the statute to satisfy § 2923.5(b). (See
6 *Compl., Ex. 7*, at 2.)

7 Accordingly, the Court **DISMISSES** the tenth cause of action for violation of
8 California Civil Code § 2923.5 **WITHOUT PREJUDICE**.

9
10 **III. MOTION TO STRIKE - RULE 12(F)**

11 Rule 12(f) provides that a federal court may strike from the pleadings any
12 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.
13 Fed. R. Civ. P. 12(f). The function of a motion to strike is to avoid the unnecessary
14 expenditures that arise throughout litigation by dispensing of any spurious issues prior
15 to trial. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); *Chong*
16 *v. State Farm Mut. Auto. Ins. Co.*, 428 F. Supp. 2d 1136, 1139 (S.D. Cal. 2006).

17 Here, Defendant moves to strike Plaintiff's prayer for damages based on the cause
18 of action for unfair and unlawful business practice, punitive damages, and attorney's
19 fees. All of the causes of action on which Plaintiff prayed for the aforementioned relief
20 have been dismissed. Furthermore, Plaintiff did not oppose the motion which "may
21 constitute a consent to the granting of that motion." *See* Civ. L.R. 7.1(f.3.c).

22 Accordingly, the Court **STRIKES** Plaintiff's prayer for damages based on the
23 cause of action for unfair and unlawful business practice, punitive damages, and
24 attorney's fees.

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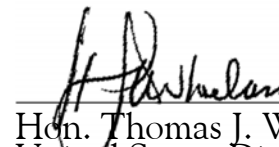
1 **IV. CONCLUSION & ORDER**

2 In light of the foregoing, the Court **GRANTS** Defendant's motion to dismiss
3 (Doc. 20), and **GRANTS** Defendants' motion to strike (Doc. 19). Plaintiff has not,
4 however, been afforded an opportunity to amend his complaint in federal court. As
5 such, Plaintiff is hear by granted **LEAVE TO AMEND**.

6 If Plaintiff decides to file an amended complaint, he must do so on or before **May**
7 **6, 2011**.

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9 **IT IS SO ORDERED.**

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11 DATED: April 14, 2011

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14 Hon. Thomas J. Whelan
United States District Judge
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